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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T.G. KUEHN,

Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, *et alia*,

Respondents.

On petition for a writ of certiorari to the Court of Appeals of Minnesota

PETITIONER'S BRIEF IN REPLY TO OPPOSITION OF RESPONDENT COUNCIL 65, AFSCME

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INTRODUCTION

Petitioner Carter T.G. Kuehn hereby replies to the brief in opposition of respondent Council 65, AFSCME.

ARGUMENT

Council 65's basic thesis is that Kuehn is requesting this Court to "review * * * two factual findings by the

Minnesota Bureau of Mediation Services".[1] Nothing could be further from the truth. For Kuehn's position raises only questions of *law*, against a background of *undisputed facts*.

I. As to Council 65's notice, the record is absolutely clear—and Council 65 does not deny—that the notice:

* contains *no* "verification by an independent auditor" or "certified public accountant's verified breakdown of expenditures", as required by *Hudson*;[2]

* sets out *no* list of the activities that Council 65 claims constitute its "collective-bargaining" services to Kuehn, as required by *Hudson*;[3]

* provides *no* definitions of "collective bargaining" by which Kuehn can "gauge the propriety of the union's fee";[4] and

* explains *nothing* about the methodology of cost-accounting Council 65 used to arrive at the bare figure of the "fair-share fee".

The Minnesota agencies and Court of Appeals did *not* find as "*facts*" that these demerits did not exist in the notice. To the contrary: They held that the notice was valid, as a matter of Minnesota *law*, notwithstanding the *unquestionable factual absence* in the notice of an accountant's "verification", a list of Council 65's purported

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[1]Brief in Opposition at 6.

[2]475 U.S. 292, 307 n.18, 310 (1986).

[3]*Id.* at 306-07 ("identifying the expenditures for collective bargaining").

[4]*Id.* at 306.

"collective-bargaining" services, definitions of "collective bargaining", and any indication of the union's accounting methodology.

If these facts do not evidence a patent violation of *Hudson*, nothing does.

II. As to the issue of "*per capita* payments", Council 65 misrepresents Kuehn's contention. Kuehn does *not* claim that

> it is unconstitutional for a state to permit a union acting as an exclusive collective bargaining representative to include in the amounts chargeable to objecting fee payers any portion of the local's affiliation payments to related labor organizations * * * .[5]

Rather, Kuehn admits that such payments may be made —*if* the exclusive representative establishes that the "affiliates" have, in fact, provided legitimate "collective-bargaining" services to *Kuehn's* bargaining-unit. In this case, however, no such *factual* proof was made (or even offered), the Minnesota agencies and the Court of Appeals relying instead on the *conclusive legal presumption* that the purportedly "integrated" nature of Council 65 and its affiliates obviated the need for a factual demonstration that the affiliates had provided services beneficial *to Kuehn*.

Council 65's contention that *Hudson* sanctioned such a presumption is ludicrous.[6] *Hudson* requires that an exclusive representative supply information in its "fair-share" notice justifying payments to its affiliates, by showing "that none of [the payments] was used to

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[5]Brief in Opposition at 7.

[6]*Id.* at 8.

subsidize activities for which nonmembers may not be charged".[7] But nonmembers may not be charged for activities which do not benefit them.[8] Therefore, the notice must show *how* the purportedly chargeable costs of affiliates relate to the delivery of "actual benefits" to each nonmember—benefits that must, in the nature of things, accrue to that nonmember *in his own bargaining-unit*.[9] Neither Council 65's notice itself, nor any evidence presented in the so-called "extensive record compiled during a three-day hearing",[10] provides the factual, legal, logical, or even minimally rational nexus between the "*per capita* taxes" Council 65 included in its "fair-share fee" and the delivery *to Kuehn* of any "actually beneficial" services by the recipients of those "taxes".

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[7]475 U.S. at 307 n.18.

[8]The union must "identif[y] the expenditures for collective bargaining * * * that had been provided *for the benefit of nonmembers* * * * and for which nonmembers * * * can fairly be charged a fee". *Id.* at 306-07 (emphasis supplied).

[9]*See* Communications Workers of America v. Beck, 108 S. Ct. 2641, 2655, 2656 (1988) (National Labor Relations Act) (purpose of "agency-fee" arrangements is to "ensur[e] that nonmembers who obtain the benefits of union representation can be made to pay for them", and to "enable unions to charge nonmembers only for those activities that actually benefit them").

[10]Brief in Opposition at 9.

CONCLUSION

For the foregoing reasons, this Court should reject Council 65's opposition, and grant the petition.

Respectfully submitted,

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